

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN LISCHEFSKI,

Plaintiff,

No. CIV S-05-0271 FCD JFM P

vs.

LT. SWEIGERT, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. By order filed March 17, 2005, plaintiff's original complaint was dismissed with leave to file an amended complaint. Plaintiff failed to timely file an amended complaint and on July 28, 2005, this court issued findings and recommendations recommending dismissal of this action without prejudice. Plaintiff has filed objections to the findings and recommendations, and the record reflects that plaintiff filed an amended complaint on July 25, 2005. Good cause appearing, the findings and recommendations will be vacated.

The amended complaint states a cognizable claim for relief against Lieutenant Sweigert and Captain Arnold pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b).¹ If the

¹ There are other individuals referred to in the body of the amended complaint, none of whom are specifically identified as defendants in this action.

1 allegations of the amended complaint are proven, plaintiff has a reasonable opportunity to prevail
2 on the merits of this action.

3 On August 19, 2005, plaintiff filed a second motion for appointment of counsel.²
4 The United States Supreme Court has ruled that district courts lack authority to require counsel
5 to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S.
6 296, 298 (1989). In certain exceptional circumstances, the court may request the voluntary
7 assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017
8 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present
9 case, the court still does not find the required exceptional circumstances. Plaintiff's motion for
10 the appointment of counsel will therefore be denied.

11 Finally, on August 22, 2005, plaintiff filed a document seeking relief from the
12 filing fee for this action "due to breach of contract." (Document filed Aug. 22, 2005, at 1.)
13 Plaintiff contends that the partial payments that have been withdrawn from his trust account have
14 left him with no funds for hygiene products and has led to the destruction of plaintiff's property
15 that he had intended to send home. This court has no authority to relieve plaintiff from the
16 partial filing fee requirements of the in forma pauperis statute. Plaintiff's request will therefore
17 be denied.

18 In accordance with the above, IT IS HEREBY ORDERED that:

- 19 1. The findings and recommendations filed July 28, 2005 are vacated.
20 2. Service is appropriate for the following defendants: Lt. Sweigert and Captain
21 Arnold.
22 3. The Clerk of the Court shall send plaintiff two USM-285 forms, one summons,
23 an instruction sheet and a copy of the amended complaint filed July 25, 2005.

24 /////

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26 ² Plaintiff's first motion was filed with his original complaint and denied in the court's
March 17, 2005 order.

1 4. Within thirty days from the date of this order, plaintiff shall complete the
2 attached Notice of Submission of Documents and submit the following documents to the court:

- 3 a. The completed Notice of Submission of Documents;
4 b. One completed summons;
5 c. One completed USM-285 form for each defendant listed in number 2
6 above; and
7 d. Three copies of the endorsed amended complaint filed July 25, 2005.

8 5. Plaintiff need not attempt service on defendants and need not request waiver of
9 service. Upon receipt of the above-described documents, the court will direct the United States
10 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4
11 without payment of costs.

12 6. Plaintiff's August 19, 2005 motion for appointment of counsel is denied.

13 7. Plaintiff's August 22, 2005 request for relief from the filing fee requirements
14 of 28 U.S.C. § 1915(b) is denied.

15 DATED: October 12, 2005.

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18 UNITED STATES MAGISTRATE JUDGE

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20 lisc0271.vac1
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff, No. CIV
vs.

NOTICE OF SUBMISSION
OF DOCUMENTS

Defendants.

_____ /

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

_____ completed summons form

_____ completed USM-285 forms

_____ copies of the _____
Amended Complaint

DATED:

Plaintiff